

OCT 9 1997

PATRICK FISHER
Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOHN MORGAN,

Petitioner-Appellant,

v.

TULSA COUNTY, Oklahoma,

Respondent-Appellee.

No. 96-5243
(D.C. No. 96-CV-748-BU)
(N.D. Okla.)

ORDER AND JUDGMENT*

Before KELLY, McKAY, and BRISCOE, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Petitioner filed this action under 28 U.S.C. § 2254, seeking habeas corpus relief. Petitioner was convicted in Oklahoma state court after a retrial; another trial on separate charges was scheduled for January, 1997. The district court dismissed the habeas action, without prejudice, because petitioner had not exhausted his available state remedies by presenting his claims to the Oklahoma Court of Criminal Appeals. We AFFIRM the district court's dismissal without prejudice. See Coleman v. Thompson, 501 U.S. 722, 731 (1991). The application for a certificate of appealability is DENIED, and the portion of the district court's order of September 5, 1996, ordering partial payment of fees is VACATED.¹

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge

¹ This court held in United States v. Simmonds, 111 F.3d 737, 743 (10th Cir. 1997), that the Prisoner Litigation Reform Act, which amended 28 U.S.C. § 1915, does not apply to habeas actions. We, therefore, vacate that portion of the district court's order that ordered partial fee payment in accordance with the amended § 1915.